AARP Report: David v. Goliath Why consumers are losing New York's utility game.

Lack of consumer utility advocate office leaves New Yorkers paying some of the highest rates in the nation.

January 2014

Executive Summary

Consumers may not know that usually when a New York utility seeks and gets approved for a rate increase, consumers are charged twice: once when they pay the increased rate and again when the cost for what the utility company spent on representing itself while seeking the rate increase is passed along to the consumer in their bill. New York utilities charge their ratepayers more than $10 million a year to cover the costs of experts who argue for higher rates before regulators. Yet unlike 40 other states, New York has no independent, sufficiently funded utility consumer advocate office to fight rate increases on behalf of residential ratepayers or to appeal a rate increase in court.

New York utilities charge some of the highest prices in the nation. Large numbers of low- and moderate-income seniors and families are falling behind in making payments for high-priced utility service they cannot afford, often incurring additional late payment charges. Every month hundreds of thousands of households face great stress when utilities threaten shutoff of essential electric or gas service as a bill collection measure. New York's investor-owned utilities terminated electric or gas service to more than 283,974 households in 2011.

The rates New York's investor-owned utilities charge are approved by the Public Service Commission (PSC) after a hearing during which the rate request should be thoroughly reviewed in an administrative hearing. The utilities' expenses for the lawyers and experts they hire to justify rate increases and advance utility interests in regulatory matters are included in the rates they charge.

A review of the annual reports of New York's investor-owned utilities shows that through rates they recover approximately $10 million they spend per year to support their rate increase and other regulatory requests. This totals about $43 million that the utilities have sent to their customers from 2009-2012. Essentially, ratepayers are paying to propose and defend increases in their own rates. In contrast, ratepayers have little to no representation at the PSC during rate proceedings, even though the ratepayers are paying the legal bills of the party who is trying to raise their rates.

Additionally, New York State's support for utility consumer advocacy has dwindled to the point that New York consumers lack full and independent representation in major matters affecting the reliability and affordability of essential utility services. New York's support for this function also lags in comparison with other states' allocations of resources for utility consumer representation. For example, New Jersey allocates $7 million in resources, and Maryland allocates $3,162,242 to represent consumers, as noted in the February 2013 paper, "Utility Protection and Oversight and the Need for Improvement and Oversight," by AARP and the Public Utility Law Project.

More than 40 states and the District of Columbia have independent offices charged with the mission to represent residential utility service consumers in cases before state and federal utility regulatory commissions. These offices typically appear on behalf of consumers as parties in state and federal regulatory commission proceedings and in judicial review proceedings concerning rates and conditions of public service utility. They typically have independent authority to commence proceedings; to take legal positions that are different from those of utilities and their regulators, and to seek judicial review of state and federal regulatory agency decisions. No such office exists in New York State.

When AARP examined the residential electric rate savings for customers reported by several states that have independent utility consumer advocate offices, it dwarfed the costs of the operations.

For example, Connecticut, a state much smaller than New York, reported approximately $730 million dollars in direct savings to ratepayers in the 2012 fiscal year on a $3 million budget—a 243-1 return on investment according to its advocate, the Office of Consumer Counsel. In other states:

- Illinois saved more than $300 million in 2011 on a $2.6 million budget (a 115-1 return on investment) according to its Citizens Utility Board.
- Maryland saved at least $114 million in 2012 for its residential utility ratepayers as a result of its $3.2 million investment (a 36-1 return) according to its Office of People's Counsel.
- Maine saved its residential customers at least $24 million in 2012 on a $1.7 million investment (a 14-1 return) according to its Public Advocate.
- Ohio saved $107 million on a $5.1 million budget (a 21-1 return), its Consumer Counsel reported.
- Pennsylvania saved more than $500 million in two 2006 cases and operates on a $5.1 million annual budget (a 98-1 return) according to its Consumer Advocate.

Additionally, California's Division of Ratepayer Advocate reports a 153-1 return on investment in terms of reduced residential utility rates.

In June 2013, Governor Andrew Cuomo's Moreland Act Commission on Utility Storm Preparation and Response found that New York needs "a robust, permanent, professional consumer advocate office to represent ratepayers." To effectuate the Moreland Commission's recommendation, substantive legislation is needed to reform the structure for utility consumer advocacy, and the level of budget funding for consumer representation must be increased.

AARP believes that the Governor and the Legislature should take action to implement this Moreland Act Commission recommendation in the 2014 budget and legislative session and give ratepayers an independent voice.

1. High Utility Rates Are Burdening New York's Residential Consumers.

New York's investor-owned electric utilities and the Long Island Power Authority[1] charge some of the highest rates in the nation. According to the most recent data from the United States Energy Information Administration, in September 2013 New York's residential customers paid 19.57 cents/kwh, second only to Hawaii, and 56% more than the national average of 12.52 cents/kwh.[2] The situation is not getting better: New York residential electric prices rose .6 cents/kwh from their September 2012 level, three times the .2 cent/kwh rise in national prices over the past year.

Low- and moderate-income seniors and families are falling further behind in making payments for high-priced utility service they cannot afford. The number of customers with unpaid bills more than 60 days

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[1] Consolidated Edison Company of New York, Inc. (Con Edison) (gas and electric), National Grid, Niagara Mohawk (gas and electric), KeySpan - New York (gas), and KeySpan - Long Island (gas); NYSEG, RG&E, National Fuel Gas Distribution Corporation, Orange & Rockland Utilities, Inc., and Central Hudson Gas & Electric Company

[2] Table 5.6.A, Average Retail Price of Electric Service to Ultimate Customers by End Use Sector, by State, September 2013 and 2012, EIA, *Electric Power Monthly with Data for September, 2013* (November 2013), available at http://www.eia.gov/electricity/monthly/pdf/epm.pdf. New York's industrial customers pay the nation's second lowest prices for electricity, and their prices decreased from September 2012 to September 2013.

overdue rose *again* in 2012 to 1,050,000, matching the level it hit during the peak of the economic crisis in 2008-9. The amount those customers owed collectively hit $651.6 million, a level 12% *higher* than the peak of the crisis.[3] This burden of utility service debt is further compounded by utility late payment charges[4] and often additional borrowing from third parties at extremely high interest to make emergency payments sufficient to avoid shutoff.[5] Each month, large numbers of residential customers are given a payment ultimatum, a Final Termination Notice (FTN) backed by a threat of imminent shutoff of service as a collection measure. In 2012, New York's investor-owned electric and gas utilities sent *6.7 million* FTNs.[6]

Reports filed with the PSC by the investor-owned utilities indicate that in 2011, New York's investor-owned utilities terminated electric or gas service to more than 283,974 households as a bill collection measure. These shutoffs often lead to major household hardship and desperation as customers scramble to find help to pay the utility the amount demanded to reconnect service. Utility service is essential for household lighting, refrigeration, and cooking and in many circumstances, for heating, cooling, water supply, and reliable telecommunications and Internet service. Without utility service, households cannot function normally. Society as a whole faces significant costs from unsafe or unhealthy situations in the absence of utility service. These costs can include emergency public assistance, increased homelessness, illness or death due to lack of heat or air conditioning needed by vulnerable household members, emergency medical care and hospitalization, and sometimes the loss of life, property damage, and the cost of fire, police, and other first responders when fires occur due to use of less safe energy sources. Even people keep up with their bills it does not mean they can afford these rates. Many times people cut back on other necessities to pay their utility bills.[7]

2. Customers Pay the Costs for Utility Lawyers and Experts to Advocate at the PSC for Higher Utility Rates and to Advance Utility Interests in Other Regulatory Matters.

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[3] For example, in December 2012, 345,299 Con Edison residential customers (12%) had arrears exceeding 60 days. In December 2012, 226,902 National Grid residential customers (almost 16%) were more than 60 days in arrears. In December 2012, 171,811 KeySpan New York residential customers (almost 19%) were more than 60 days in arrears. In December 2012, 78,293 KeySpan Long Island residential customers (15%) were more than 60 days in arrears.

[4] PSC regulations provide that "[a] utility may impose a one-time or continuing late payment charge, not in excess of 1 1/2 percent per month on the unpaid balance of any bill for service including any interest thereon, provided by the utility" (16 NYCRR § 11.15).

[5] The most common reason households turn to high interest loans is to pay a utility bill. See *A Complex Portrait: An Examination of Small-Dollar Credit Consumers*, CFSI, Aug. 2012; Juan Rodriguez and Aundraya Ruse, *Who is using small-dollar loans and why?*, Yahoo Finance, Sept. 11, 2012.

[6] Source: Utility Billing and Collection reports submitted monthly to the New York State Public Service Commission.

[7] *FDNY says fire that killed 3 boys in the Bronx sparked by candle*, ABC News (Oct. 27, 2013:
"Investigators say the fire that killed three children in the Bronx Friday night was accidental, caused by a candle in the kitchen area…. Their 25-year-old mother, 4-year-old sister, and 4-month-old baby sister were taken to Lincoln Hospital where they were being treated for smoke inhalation…. Ten other people from surrounding apartments were treated for smoke inhalation…. **A spokesman for Con Ed says power had been cut off to the family's apartment for non-payment**…. According to neighbors, the mother had gone to the bodega downstairs and bought candles to light the apartment…. The mother had been approved for public assistance, and the lights were due to come back on Saturday." [*Emphasis added]*).

Annual reports of New York's investor-owned utilities from 2009-2012 indicate that approximately $10 million a year is[8] (see also appendix) recovered from New York customers to support the utilities' expenditures in rate cases and other regulatory matters. In contrast, ratepayers have little to no representation at the PSC when rates are being discussed even though they are paying the legal bill of the party who is trying to raise their rates.

The rates New York's investor-owned utilities charge are approved by the Public Service Commission after a hearing during which the rate request should be thoroughly reviewed in an administrative hearing. These proceedings often involve extended negotiations and a multitude of collaborative meetings among stakeholders.

Utility expenses for the lawyers, consultants, and expert witnesses they hire to justify rate increases and advocate for the utility on other regulatory matters are included in the overall operating costs of utility service that are covered by the rates approved by the PSC.

In addition to formal rate proceedings, utilities often advocate for their positions in generic proceedings and informally with commissioners and PSC staff. The website Project Sunlight indicates frequent visits by executives of regulated utilities with PSC Commissioners and Department of Public Service staff. For example, in 2013, with a case seeking major rate increases underway, Con Edison executives met more than 20 times with commissioners and Department of Public Service staff, including a meeting of the Con Edison CEO with the PSC Chairman, to discuss regulatory and rate–making matters.

Customers in effect are reimbursing the utilities for the expenses of the highly qualified lawyers, executives, consultants, expert witnesses, and other professionals upon whom the utilities rely to gain PSC approval of increased rates and pursue utility objectives regarding regulatory policies. Equivalent participation in proceedings and informal sessions between the PSC and advocates for ratepayers, on the other hand, appear to be rare if not nonexistent. Thus there is a serious imbalance in the presentation of information and viewpoints to the PSC in both formal and informal processes.

In contrast to the expenditures the utilities make to advance their interests, the resources for residential utility consumer advocacy are far less. There is insufficient funding of participation by an independent

[8] Regulatory commission expenses are reported annually by each regulated utility in New York State to the New York State Public Service Commission (PSC). These regulatory commission expenses include all jurisdictions: those incurred in New York State, other states, and federally. New York State regulatory commission expenses include assessments that fund the operations of the PSC as well as other operations of New York State government and the monies spent by the utilities advocating for their own interests in New York State rate cases and other regulatory proceedings. Regulatory commission expenses as reported by New York State utilities on FERC Form 1 to the New York PSC are recorded in account #928, which is a component of the operations and maintenance expense line on the utility's statement of income for the year. Amounts included in regulatory commission expenses are also detailed on FERC Form 1 pages 350-351. Regulatory commission expenses included on the utility's statement of income are subject to recovery from ratepayers. Amounts not included on the utility's statement of income are either deferred or disallowed, depending on the circumstances. All amounts reflected in the accompanying analysis of 11 New York State utilities' regulatory commission expenses from 2009-12 were included on the statements of income for each utility. These amounts ($43.2 million in total; $10.8 million average annual) were therefore subject to recovery from ratepayers.

utility consumer advocate on behalf of New York's residential consumers, even as those same consumers are paying the bills for such advocacy by utilities.

3. New York State Ratepayers Lack Representation at the PSC.

Regulatory commissions such as New York's PSC often view their role and the role of their staff as mediating the competing interests of utilities and others in their decision making. They depend on vigorous external stakeholder participation in their complex proceedings to develop facts that will be included in the evidentiary record upon which decisions must ultimately be based.

There is no shortage of such participation from utilities or from large commercial and industrial customers. But there is a lack of input from parties representing residential consumers who would focus regulatory attention upon current and emerging issues facing consumers and who would protect residential consumer interests from being eroded by competing interests.

The proper functioning of the regulatory process depends on vigorous and full professional representation of consumers that is separate and independent from the regulatory body. Industrial and commercial consumers have associations that employ legal counsel to represent their interests before state and federal regulatory bodies and throughout the judicial review process, while residential consumers find it difficult to pool their resources and secure independent legal counsel and experts to represent them.

More than 40 states and the District of Columbia have independent offices charged with the mission to represent residential utility service consumers in cases before state and federal utility regulatory commissions. These offices typically appear on behalf of consumers as parties in state and federal regulatory commission proceedings and in judicial review proceedings concerning rates and conditions of service of public utilities.

The state advocates typically have independent authority to commence proceedings, to take legal positions different from those of utilities and their regulators, and to seek judicial review of state and federal regulatory agency decisions. They monitor utility customer complaints and grievances and investigate independently the services and rates of utilities, often through the discovery process within the context of formal proceedings.

Independent state offices also collect and analyze data concerning utility issues, prepare and issue testimony and reports and make recommendations, and are empowered to initiate complaints or other proceedings in response to patterns of customer complaints. They provide public information, consultative services, and technical assistance and strive to adequately and professionally represent the interests of residential customers in the course of proceedings affecting them. AARP believes that such offices are necessary to support sustained high-quality representation of consumers.

New York's commitment to support residential consumer advocacy in utility matters is but a fraction of what it once was. In 1994-95 the Consumer Protection Board (CPB) was budgeted for 39 staff, with 31 dedicated to utility intervention work in PSC cases. The CPB was abolished, and the utility intervention function was transferred to the Department of State where four persons now work on utility matters in the Utility Intervention Unit (UIU) The powers of the UIU set out in Section 94-A of the New York Executive Law authorize the UIU only to participate in administrative proceedings of the PSC and federal agencies. The UIU, lacks express power independently to challenge or support any utility regulatory commission decisions in judicial review proceedings .[9]

In addition, New York allocates insignificant resources to support outside independent utility consumer representation. Funding for the Public Utility Law Project of New York (PULP), a small not-for-profit that advocates for New York ratepayers, has dwindled over the past 20 years. It closed in 2010 and 2011 before being reopened by a legislative addition to the 2012-13 Executive Budget. AARP believes that funding to PULP should be maintained so that organization can carry out its mission of helping ratepayers in our state. Intervenor funding should be available to nonprofits like PULP in our state.

[9] In its early days, the former CPB similarly lacked any express statutory power to question orders of the PSC. Pooler v. PSC, 89 Misc.2d 700, 58 A.D.2d 940, aff'd 43 N.Y.2d 750 (1977). That deficiency of the CPB was subsequently addressed. In the transfer of legacy utility intervention functions of the CPB to the Department of State, however, no authority was given to the UIU, on its own motion, to question in court a state or federal regulatory decision affecting New York utility consumers.

4. The Moreland Act Commission Final Report Recommends a Robust, Permanent, Professional Consumer Advocate Office to Represent Residential Utility Ratepayers.

Former New York State Attorney General Robert Abrams, Co-Chair of the Moreland Act Commission, said**,** *"The implementation of the Commission's recommendations will create the opportunity for a stronger safety net for New Yorkers in the event of future storms, provide for more consumer protection for utility customers who historically have been disadvantaged by lack of a level playing field, and will bring to justice those who transgressed by violating New York's ethics laws."*[10]

The Moreland Act Commission on Utility Storm Preparation and Response was created by Governor Andrew Cuomo on November 13, 2012, by Executive Order No. 73. The Commission's charge encompassed an investigation of the broader functioning of utilities and utility regulation in the state.

In June 2013, the Commission issued its final report, including findings that "many ratepayers lack the necessary resources to express their opinions and concerns on matters that impact their lives and their pocketbooks" and that New York consumers "themselves may feel marginalized when compared to utility companies and other special interest groups during proceedings before the PSC."

The Moreland Act Commission recognized the serious deficiencies in the funding and structures for utility consumer advocacy and declared that the state needs "a robust, permanent, professional consumer advocate office to represent ratepayers."[11]

5. Governor Cuomo Has the Opportunity to Implement His Moreland Act Commission Recommendations in His 2014-15 Executive Budget Proposals.

The budget for the 2013-14 year had been adopted in March, prior to the Moreland Act Commission's June recommendations for reforming and revitalizing utility consumer advocacy, so it was not possible for the Governor to address the need and to allocate the necessary funding in the 2013-14 budget.[12]

The Legislature has the support to have more consumer representation in New York. Late in the legislative session, shortly before the Moreland Act Commission issued its June 22, 2013 final report, the Assembly passed a bill A.6239 sponsored by Assemblyman Dinowitz addressing jurisdictional

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[10] Governor Cuomo Announces Release of Final Moreland Commission Report Exposing Deficiencies and Troubling Conduct at LIPA and Proposing Dramatic Reform to Utilities (http://www.governor.ny.gov/press/06232013-utilities-reform)

[11] The Commission further said "[t]he State should create a Citizens Utility Board that is independent, controlled by ratepayers, adequately funded and not subject to political interference using one of the models identified herein." The Moreland Commission Final Report is available at http://utilitystormmanagement.moreland.ny.gov/sites/default/files/MACfinalreportjune22.pdf

[12] The 2013-14 state budget allocated a new appropriation to the UIU of $1 million for wholesale electric market advocacy, which is part of a $10 million FERC disgorgement fund approved by FERC in October 2012 in a settlement of allegations that traders manipulated the NYISO wholesale electricity markets. More than a year later, this program has not been implemented.

shortcomings of the state's UIU as well as the office's lack of independence by reforming the UIU into a new state office of the utility consumer advocate.[13] A parallel bill was introduced in the Senate S.4550 by Senator Savino but was not acted upon prior to Senate adjournment.

AARP believes Governor Cuomo should effectuate the Moreland Act Commission's recommendation and include a proposal in his 2014-15 Executive Budget to create an independent utility consumer advocate office to advocate and participate fully in cases before the PSC that affect the prices, terms, and conditions of utility service and the ability to question utility and PSC actions in our courts.

Conclusion

New York should not perpetuate the status quo with insufficient representation at the PSC for residential ratepayers while they are paying some of the highest utility rates in the country. We believe we can do better in this state, and we look to Governor Cuomo for leadership to change this direction, starting with giving millions of New Yorkers a voice by proposing an independent utility consumer advocate office for our state.

New York State consumers are burdened with the costliest utility service in the continental United States, which is causing financial hardship to many low- and moderate-income New Yorkers especially among older people who devote a much higher percentage of their household income to pay their utility bills. The Moreland Act Commission correctly identified the lack of an adequately resourced state utility advocate with sufficient independence and power to advocate on behalf of residential customers, question utility and PSC actions, and participate fully as a stakeholder in lengthy and complex regulatory processes and in less formal advocacy.

The Commission also correctly identified the solution, which is to create a credible office independent from the PSC and other regulatory bodies, with the ability to seek judicial review of utility actions and regulatory decisions and with sustained funding to support professional staffing and full participation in regulatory proceedings affecting rates and conditions of service.

The upcoming 2014 legislative session presents the first opportunity for the Governor and Legislature to address the Moreland Act Commission recommendations regarding utility consumer advocacy. As the first step in this process, Governor Cuomo needs to address the issue in his Executive Budget to be issued in January 2014 with a proposal to establish an independent utility consumer advocate office.

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[13] The bill addressed the powers, structure, and degree of independence of the existing Department of State's UIU through amendment of its enabling statute, Executive Law 94-a. The bill would have broadened the UIU's express powers including to include telecommunications and other utility services, to seek judicial review of the actions of utilities and their regulators, and to represent New York state's consumers in federal agency (e.g., FERC and FCC) and in judicial review proceedings. It would also have improved the degree of independence by making the Director of UIU a gubernatorial-appointed state officer with legislative confirmation and a term of years comparable to that of PSC commissioners, with protection against removal for positions taken in advocacy.

Appendix

Regulatory Expenses of the 11 New York State Utilities – 2009-2012

Category	Average Electric	Average Gas	Average Steam	Average Water	Average Total
PSC Annual Assessments	35,687,107	22,931,313	1,941,868	8,458	60,568,746
18A Assessments	263,158,694	116,353,037	3,917,831	128,432	383,557,993
Rate Cases & Other New York State Proceedings	**6,928,946**	**3,444,904**	**184,925**	**239,771**	**10,798,546**
Subtotal - New York State	305,774,746	142,729,254	6,044,624	376,660	454,925,284
Other Jurisdictions (FERC, other states, etc.)	4,393,419	2,579,193	0	0	6,972,613
Total	310,168,166	145,308,447	6,044,624	376,660	461,897,897

Category	Total Electric	Total Gas	Total Steam	Total Water	Total Total
PSC Annual Assessments	142,748,429	91,725,253	7,767,470	33,830	242,274,982
18A Assessments	1,052,634,774	465,412,146	15,671,324	513,726	1,534,231,970
Rate Cases & Other New York State Proceedings	**27,715,782**	**13,779,615**	**739,701**	**959,085**	**43,194,184**
Subtotal - New York State	1,223,098,985	570,917,014	24,178,495	1,506,641	1,819,701,136
Other Jurisdictions (FERC, other states, etc.)	17,573,677	10,316,774	0	0	27,890,451
Total	1,240,672,662	581,233,788	24,178,495	1,506,641	1,847,591,586

Notes:

1. Utilities Included in Analysis:

Central Hudson
Con Edison
Corning Gas
KeySpan Long Island
KeySpan New York
National Fuel Gas
Niagara Mohawk
New York State Electric and Gas
Orange and Rockland Utilities
Rochester Gas and Electric
United Water

2. Source: Utility Annual Reports to New York State Public Service Commission

3. No telephone utilities are included in this analysis.

4. Due to lack of clarity in the annual reports of certain utilities to the PSC, some inter-jurisdictional estimates of regulatory expenses have been made (for example, New York vs. Federal) in order to estimate total New York State regulatory commission expense.